SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1949~~ 1950

No. ~~670~~ 30

THE UNITED STATES OF AMERICA,
Appellant,

vs.

UNITED STATES GYPSUM COMPANY, SEWELL L. AVERY, OLIVER M. KNODE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STATEMENT OF THE CELOTEX CORPORATION OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

ANDREW J. DALLSTREAM,
WALTER G. MOYLE,
NORMAN WAITE,
RALPH P. WANLASS,
ALBERT E. HALLETT,
Counsel for Appellees.

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STATUTES CITED

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,
Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, ET AL.,
Defendants

STATEMENT OF THE CELOTEX CORPORATION OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

While the above entitled cause is one which is technically reviewable by this Court on a direct appeal from the District Court, this appellee, The Celotex Corporation, asserts that the unsubstantial character of the purported questions raised by the Government's appeal is so apparent upon the face of the record as to warrant this Court's summarily disposing of the appeal at this stage of the proceedings upon a motion to dismiss or affirm under the provisions of Rules 7 and 12 of this Court.

The said appellee therefore files this its statement in opposition to the Government's statement as to jurisdiction, and includes herein its motion to dismiss the said appeal or, in the alternative, to affirm the decree of the District Court, on the ground that the supposed questions

raised by said appeal are so unsubstantial as not to require further argument.

The Factual and Procedural Basis of the Present Decree

In reversing the earlier decree of the District Court in this case (dismissing the complaint, 67 F. Supp. 397), and in remanding the case "for further proceedings in conformity with this opinion," this Court, in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 68 S. Ct. 525 (1948), had, *inter alia*, expressed the views that (p. 389):

> "* * * industry-wide license agreements entered into with knowledge on the part of the licensor and licensees of the adherence of others, with the control over prices and methods of distribution through the agreements and the bulletins, were sufficient to establish a *prima facie* case of conspiracy." (To violate the Sherman Act)

and that (p. 400):

> "The General Electric case affords no cloak for the course of conduct revealed in the voluminous record in this case."

After the mandate had been filed and the case redocketed in the court below, the Government moved for the entry of a summary judgment and took the position that this Court's said decision had determined as a matter of law that a mere plurality of licenses among competitors in an entire industry, with price limitations adhered to by each of them with knowledge of the adherence of others, was, without more, a violation *per se* of the Sherman Act. Having so construed this Court's opinion, the Government took the further position that, since the defendants did not deny that they had executed the license agreements or that they had

adhered to the pricing provisions thereof with knowledge of the adherence of others, no genuine issue remained as to any fact essential to make out a violation of the Sherman Act, and that therefore all of the abuses usually constituting a violation of the Sherman Act could be laid aside and ignored and yet, on summary judgment, the Government was entitled to a decree (Tr. 7814-15). It was upon this basis, that the decree which the Government now seeks to challenge was entered.

The Questions Raised by the Government's Appeal Are Unsubstantial and Without Merit

In considering the Government's criticism not only of the decree as an entirety but of specific aspects thereof, it should be kept in mind, as this Court stated in affirming the trial court's decree in *International Salt Co.* v. *United States*, 332 U. S. 392, 400-401, 68 S. Ct. 12 (1947), that

> "The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185, 65 S. Ct. 254, 260, L. Ed. 650; *United States* v. *National Lead Co.*, 332 U. S. 319, 67 S. Ct. 1634."

This same thought is reflected in Mr. Justice Frankfurter's statement, in *United States* v. *Paramount Pictures*, 334 U. S. 131, 179, 68 S. Ct. 915 (1948), that:

> "• • • it is not the function of this Court, and it would ill discharge it, to displace the district courts and write decrees *de novo*. We are, after all, an appellate tribunal even in Sherman Act cases."

Furthermore, as we have pointed out, the Government, in moving for summary judgment, took the position that a

mere plurality of licenses among competitors in an entire industry, with price limitations adhered to by each with knowledge of the adherence of others, was, without more, a violation *per se* of the Sherman Act and, laying aside all of the abuses usually constituting a violation of the Sherman Act, entitled it to a decree.

Having secured the very type of decree which it sought by moving for summary judgment, the Government is not entitled now to seek a decree based upon other controversial issues of fact or granting injunctive relief against violations not shown to have been committed here just as though the Court had actually heard the entire case and had determined such disputed issues of fact adversely to the defendants on an actual trial. Certainly an appeal by the Government from a form of decree which it itself sought and secured should not be allowed and raises no substantial question. Even the Government cannot

"Eat its cake and have it too."

An example of a similar situation is *Associated Press* v. *United States*, 326 U. S. 1, 22, 65 S. Ct. 1417, where, in affirming the decree as entered by the trial court, this Court pointed out that:

> "The fashioning of a decree in an anti-trust case in such a way as to prevent future violations and eradicate existing evils, is a matter which rests largely in the discretion of the Court. *United States* v. *Crescent Amusement Co., supra.* A full exploration of facts is usually necessary in order properly to draw such a decree. In this case the government chose to present its case on the narrow issues which were within the realm of undisputed facts. In the situation thus narrowly presented, we are unable to say that the Court's decree should have gone further than it did. * * *"

Again this general principle is reflected in Mr. Justice Frankfurter's statement, in *International Salt Co.* v. *United States, supra* (404-405), that:

> "Having invited judgment on the bare bones of the pleadings which merely raise the validity of the tying clauses, the Government is not entitled to remedies which go beyond the justification of the pleadings. The government ought not to have it both ways."

Keeping these general principles and the factual and procedural background in mind, let us now proceed to examine such decree and the criticisms levelled by the Government against its scope and form.

I

The Government's Criticism of the Decree as an Entirety Is Unsubstantial and Without Merit in That the Present Decree Not Only Terminates and Dissipates the Effects of the Practices Condemned by This Court But Provides Adequate and Effective Safeguards Against Any Continuation, Revival or Renewal of Such Practices.

In contending that the questions raised in its appeal are substantial, the Government claims, *inter alia*, that:

> "For all practical purposes, the decree does no more than to terminate the provisions of existing license agreements which authorize U. S. Gypsum to fix its licensees' sales prices,"

and

> "patently fails to provide effective safeguards against continuation or renewal of defendants' non-competitive pricing practices."

and that therefore

> "the Government has won a lawsuit and lost a cause."

We submit that, on this record, precisely the opposite is true, and that the present decree not only terminates and dissipates the effects of the practices condemned by this Court but provides adequate and effective safeguards against the continuation, revival or renewal of such practices.

The present decree, after finding (in Article III) that "the defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of sections 1 and 2 of the Sherman Anti-trust Act," adjudges (in Article IV) "Each of the license agreements * * * unlawful under the anti-trust laws of the United States and illegal, null and void."

In Article V, the present decree goes on to enjoin and restrain "each of the defendant companies and each of their respective officers, directors, agents, employees, representatives, subsidiaries, or any person acting or claiming to act under, through or for them or any of them" from:

> "(1) the further performance or enforcement of any of the provisions of the Patent Licenses, including any price bulletin issued thereunder;
>
> "(2) entering into or performing any agreement or understanding among the defendants or any of them for the purpose of or with the effect of continuing, reviving or reinstating any monopolistic practice; and,
>
> "(3) entering into or performing any agreement or understanding among the defendants or any of them in restraint of trade and commerce in gypsum board among the several states in the eastern territory of the United States by license agreements to fix, maintain or stabilize prices of gypsum board of the terms and conditions of sale thereof."

In Article VI, the present decree also orders and directs U. S. Gypsum "to grant to each applicant therefor within 90 days after the effective date hereof, * * * a non-exclusive license to make, use and vend under any, some, or all patents and patent applications now owned or controlled by it relating to gypsum board, provided that such license agreement fixes a royalty not to exceed the royalty on the same article or process fixed in the (previous) license agreements * * *"; and enjoins and restrains U. S. Gypsum from circumventing said provisions by any transfer of its patents.

The concluding Articles (VII to X, incl.) of the decree relate to the effect of the Webb-Pomerene and Miller-Tydings Acts; approve certain forms of license agreements; retain jurisdiction to carry out and enforce the decree; and tax 50% of the costs against the defendants.

The present decree, the provisions of which are detailed above, not only terminates the existing license agreements but adequately and effectively prevents future price fixing in the gypsum board industry. Although the Government had originally charged that the defendants had employed other methods in the suppression and stabilization of other gypsum products, no determination was, nor could it have been, without a trial, made on these disputed issues, and on this record, none of the defendants' actions extended beyond the operation of the license agreements.

The present decree certainly destroys the monopoly resulting from the use of the now voided industry-wide licenses and clearly enjoins each defendant from entering into or carrying out any understanding or agreement the effect of which would be to continue, revive or renew any monopolistic practices. We cannot concur in the Government's dire views as to the purported difficulties of proof in the unlikely event that any defendant would have the au-

dacity to violate the decree. Furthermore, since price control under the patent licenses ceased in 1941, when the Hagerty starch patent expired, it seems extremely unlikely that any defendant would in the future attempt to continue, revive or renew any price fixing practices.

As this court, in *United States* v. *National Lead Company*, 332 U. S. 319, 67 S. Ct. 1634 (1949) at page 348, pointed out:

> "Assuming, as is justified, that violation of the Sherman Act in this case has consisted primarily of the misuse of patent rights placing restraint upon interstate and foreign commerce, that conduct is not before this court for punishment. It is brought before this court in order to secure an order for its immediate discontinuance and for its future prevention. That will be accomplished largely through the strict prohibition of further performance of the provisions of the unlawful agreements. Further assurance against continued illegal restraints upon interstate and foreign commerce through the misuse of these patent rights is provided through the compulsory granting to any applicant therefor of licenses at uniform, reasonable royalties under any or all patents defined in the decree, * * *"

On the record in this case, the Government certainly has not

> "Won a lawsuit and lost a cause,"

and, on the contrary, as Chief Justice Stephens stated to the Government's counsel during the June 29, 1948 hearing, this was a

> "victory you have now so fully won."

It would be just as logical to contend that in *United States* v. *Masonite Corporation*, 316 U. S. 256, 62 S. Ct. 1070, the Government had

> "Won a lawsuit and lost a cause,"

yet the decree in that case is remarkably similar in scope and form to the decree in the case at bar.

In view of these considerations, we submit that the Government's criticism of the decree as an entirety is unsubstantial and without merit in that the present decree not only terminates and dissipates the effects of the practices condemned by this Court but provides adequate and effective safeguards against any continuation, revival or renewal of such practices.

II

The Government's Criticisms of Specific Aspects of the Decree Are Likewise Unsubstantial and Without Merit in That they Do Not Demonstrate That the District Court, in Modeling Its Decree to Fit the Exigencies of This Particular Case, Abused Its Inherent Discretion, or That the Decree Is in Any Respect Defective or Inadequate.

(a) Other Media

In contending that the questions raised in its appeal are substantial, the Government claims, *inter alia*, that the injunctive provisions of paragraph (3) of said Article V of the decree

> "would not apply to price fixing activities carried on through some other medium, such as a trade association, nor would they apply to concerted action to control or stabilize prices of gypsum products;"

and that, even on a motion for summary judgment, the decree

> "should be so framed that it will bar further violation of the statute not only by the means found to have been employed but also by other 'untraveled roads' to the same end, * * *."

As we have already demonstrated, the present decree not only terminates and dissipates the effects of the practices condemned by this Court but provides adequate and effective safeguards against any continuation, revival or renewal of such practices.

As is indicated by Mr. Justice Frankfurter's statement in *International Salt Co.* v. *United States*, 332 U. S. 392, 403, 68 S. Ct. 12, this Court has repeatedly taken the position that:

> "* * * when a court condemns practices as violative of the Sherman Act and the Clayton Act, it has the duty so to fashion its decree as to put an effective stop to that which is condemned. But the law also respects the wisdom of not burning even part of a house in order to roast a pig. Ordinarily, therefore, when acts are found to have been done in violation of anti-trust legislation, restraint of such acts in the future is the adequate relief. See *New York, New Haven & Hartford R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 404, 26 S. Ct. 272, 282, 50 L. Ed. 515; *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. 1, 77, 31 S. Ct. 502, 522, 55 L. Ed. 619, 34 L. R. A., N. S., 834, Ann. Cas. 1912 D, 734; *National Labor Relations Board* v. *Express Publishing Company*, 312 U. S. 426, 435-437, 61 S. Ct. 693, 699, 700, 85 L. Ed. 930. * * *."

To the same effect, see also: *Swift & Co.* v. *United States*, 196 U. S. 375, 25 S. Ct. 276 (1905); *United States* v. *National Lead Co.*, 332 U. S. 319, 348, 67 S. Ct. 1634; and *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 409-410, 65 S. Ct. 373.

Furthermore, as we have indicated, the Government saw fit to and did take the position, on its motion for summary judgment, that a mere plurality of licenses among competitors in an entire industry, with price limitations adhered to by each with knowledge of the adherence of others, was, without more, a violation *per se* of the Sherman Act, and

that, therefore, all of the causes usually constituting a violation of the Sherman Act could be laid aside and ignored. Under such circumstances, this Court should, as it did in *Associated Press* v. *United States*, 326 U. S. 1, 22, 65 S. Ct. 1417, take the position that:

> "In the situation thus narrowly presented, we are unable to say that the Court's decree should have gone further than it did."

In view of these considerations, we submit that the fact that the present decree does not also specifically enjoin the defendants from price fixing activities carried on through some other medium, such as a trade association or other concerted action, does not demonstrate that the District Court, in modeling its decree to fit the exigencies of this particular case, abused its inherent discretion, or that the decree is in that respect defective or inadequate.

(b) The 90-Day Limitation on Licenses

The Government also contends, *inter alia*, that:

> "While the present decree provides for licensing 'any applicant', the 90-day limitation on this request makes it a practical nullity as far as any newcomer to the business is concerned."

In denying the Government's request to strike from the decree a 6-months' limitation on the right to secure patent licenses in *United States* v. *National Lead Company*, 332 U. S. 319, 67 S. Ct. 1634, this Court, at page 361, said:

> "* * * The effective date of the decree of October 11, 1945, was stayed and suspended, by the order of Mr. Justice Reed entered January 2, 1946, pending determination of the present appeals to this Court, so that more than six months already have passed since the original date of the decree without prejudicing the

rights of the parties affected. In view of such suspension and of the new effective date to be given to the decree, pursuant to the order of this Court, there will be ample time for the exercise of this option under its terms."

Since, in the case at bar, the effective date of the present decree has likewise been stayed and suspended pending the determination of the present appeals to this Court, all persons desiring to secure such licenses will have ample time within which to do so.

Furthermore, the matter is of little, if any, importance as a matter of actual fact since most of the patents in question have already expired and there is no showing that any applicant for such a license has ever been refused.

In view of the foregoing, we submit that the fact the present decree does not require U. S. Gypsum to grant nonexclusive licenses of its gypsum board patents to those applying therefore after 90 days from the effective date of the decree, does not demonstrate that the District Court, in modeling its decree to fit the exigencies of this particular case, abused its inherent discretion, or that the decree is in that respect defective or inadequate.

(c) Royalty Rates and License Provisions

The Government also claims, *inter alia*, that:

"The decree tends to enhance U. S. Gypsum's existing dominant position in the industry. Its licensees have not previously been concerned with the validity or scope of U. S. Gypsum's patents and are thus at an obvious disadvantage in bargaining with U. S. Gypsum as to the terms of new license agreements. The decree, instead of providing for a third-party determination of disputed provisions of such agreements, permits a royalty rate as high as that under the corresponding outlawed agreement, and permits U. S. Gypsum to adopt

other provisions of the forms of agreement approved by the court."

The Government's bland assertion that the various licensees

"have not previously been concerned with the validity or scope of U. S. Gypsum's patents,"

is not correct in that the defendants' proffers of proof (admitted as true by the summary judgment motion) clearly established that such licensees and U. S. Gypsum had engaged for many years in litigation respecting the validity and scope of such patents.

There is also no evidence that any of the licenses have been or are at any disadvantage in bargaining as to the terms of new license agreements. This is particularly true at the present time since such royalties and other terms can apply only to products manufactured under now existing patents and almost all of U. S. Gypsum's important patents have already expired.

Furthermore, the other provisions of such licenses (as may be applied for) have not only not been challenged by any of such former licensees but were formulated by the District Court after protracted hearings, in which U. S. Gypsum's suggestions were often disregarded or overruled, thus obviating the Government's objection that such terms were not the result of a

"third-party determination,"

since, obviously, they were, in fact, determined by a "third-party", viz: the District Court, after an opportunity had been given all interested parties to present their divergent views with respect to the terms to be incorporated into such agreements.

In view of these considerations, we submit that the fact that the present decree permits U. S. Gypsum to charge

royalties not in excess of those charged under corresponding earlier agreements and to adopt other provisions of the forms of agreement approved by the court, does not demonstrate that the District Court, in modeling its decree to fit the exigencies of this particular case, abused its inherent discretion, or that the decree is in such respects defective or inadequate.

(d) Royalty Reports and Inspections

The Government also claims, *inter alia*, that, because

> "The form applicable to U. S. Gypsum's most important patents requires the licensee to report to U. S. Gypsum monthly the 'quantity' of gypsum board manufactured under the licensed patents and the 'selling price' thereof, and permits U. S. Gypsum to inspect the licensee's records, either directly or through a certified public accountant,"

U. S. Gypsum thus

> "has the competitive advantage of exact information as to its competitors' sales and prices. In addition, the furnishing of such information would strongly militate against competitive pricing or sales expansion by any licensee, because of fear of possible reprisals by U. S. Gypsum."

In the first place, the licensor does not have any general access to the licensee's books and records. Under the forms of agreement approved by the District Court, the licensee is to file each calendar month with the licensor a verified statement setting forth merely the

> "quantity of such gypsum board manufactured by it, and sold during the preceding calendar month, together with the selling price thereof."

This gives U. S. Gypsum no more

> "competitive advantage of exact information as to its competitor's sales and prices,"

than if merely the total royalty due were reported, since the latter, plus a simple arithmetical computation, will produce the others.

It should also be noted that the licensee can require that any inspection of its books be made only by an independent certified public accountant, who will obviously be concerned only with the accuracy of the licensee's report as to total royalties due.

Furthermore, the required reports as to the "quantity" sold and the "selling price" thereof relate only to gypsum board manufactured under certain U. S. Gypsum patents and, as we have pointed out previously, most of its important patents have already expired. Thus the information in question could not give U. S. Gypsum any really comprehensive information as to its competitors' overall sales and selling prices.

As to the Government's claim that the giving of such limited information will militate against competitive pricing or sales expansion by competitors because of the

> "fear of possible reprisals by U. S. Gypsum,"

such a possibility seems rather fantastic, remote and unsubstantial. Under the main board license as approved by the District Court, U. S. Gypsum is required to furnish its competitors all data and formulae relating to the process of making a cellular product through the formation of a tenacious foam, as set forth in the claims of its patents, insofar as they apply to gypsum. The only possible "reprisal" open to U. S. Gypsum would be to manufacture and distribute its products

more efficiently so as to reduce its selling prices, which, incidentally, is the end result sought to be accomplished by the very anti-trust legislation which the Government here purports to be enforcing.

In view of the foregoing, we submit that the fact that the present decree requires licensees under certain patents to report to U. S. Gypsum monthly the "quantity" of gypsum board manufactured under such patents and the "selling price" thereof, does not demonstrate that the District Court, in modeling its decree to fit the exigencies of this particular case, abused its inherent discretion, or that the decree is in such respects defective or inadequate.

(c) Enjoining Individual Defendants, Etc.

The Government also claims, *inter alia*, that:

> "Since some of the individual defendants, particularly defendant Sewell L. Avery, were the principal architects of the acts and conduct held to be illegal, the Government seems plainly entitled to an adjudication that these defendants violated the statute, and to have the injunctive provisions of the decree run against them."

With respect to an "adjudication" as to their guilt as individuals, it would be well to recall this Court's statement, in *United States* v. *National Lead Co.*, 332 U. S. 319, 348, 67 S. Ct. 1634, that:

> "Assuming, as is justified, that violation of the Sherman Act in this case has consisted primarily in the misuse of patent rights placing restraint upon interstate and foreign commerce, that conduct is not before this Court for punishment. It is brought before this Court in order to secure an order for its immediate discontinuance and its future prevention."

With respect to the Government's contention that it is entitled to have

> "The injunctive provisions of the decree run against"

the individual defendants, it should be noted that the present decree actually enjoins not only the "defendant companies" but

> "each of their respective officers, directors, agents, employees, representatives, subsidiaries, and any other person acting or claiming to act under through or for them or any of them."

As this Court, in modifying certain portions of the decree in *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 433-435, pointed out:

> "They (the individual defendants) offended against the antitrust laws by acting on behalf of, or in the name of, a corporate defendant. There are no findings, and we assume there is no evidence, that any of them have applied for, owned, dealt in, and licensed patents appertaining to the glassware art. Nor is there evidence or finding that, as individuals acting for their own account, any of them, as a principal, has entered into any of the arrangements found unlawful by the court. Despite these facts, in practically every instance where a corporate defendant is restrained from described action or conduct, these individuals, as individuals, are likewise restrained. Any injunction addressed to a corporate defendant may, as various sections of the decree do, include its officers and agents. If the individual defendants are officers or agents they will be comprehended as such by the terms of the injunction. If any of them cease to be such, no reason is apparent why he may not proceed, like other individuals, to prosecute whatever lawful business he chooses free of the restraint of an injunction. On the other hand, if new officers and directors take the places of these defendants, such new agents will automatically come under the terms of the injunction. There is no apparent necessity for including them individually in each paragraph of the decree which is applicable to the corporate defendants whose agreements and co-operation constitute

the gravamen of the complaint. "That these individauls may have rendered themselves liable to prosecution by virtue of the provisions of § 14 of the Clayton Act, is beside the point since relief in equity is remedial, not penal."

Since, as in the *Hartford-Empire* case above referred to, the individual defendants in the case at bar were not parties to, or principals in, the agreements found to be unlawful, and acted only as officers and representatives of their respective corporations, there is no need also to enjoin the individual defendants as "individuals".

In view of the foregoing considerations, we submit that the fact that the present decree does not also find each individual defendant guilty and enjoins only "the defendant companies and each of their respective officers, directors, agents, employees, representatives, subsidiaries, and any person acting or claiming to act under, through or for them, or any of them," does not demonstrate that the District Court, in modeling its decree to fit the exigencies of this particular case, abused its inherent discretion, or that the decree is in such respects defective or inadequate.

(f) Assessment of Costs

The Government also claims, *inter alia*, that:

> "Another question of error which the appeal presents is failure to impose upon the defendants the full taxable costs of the proceeding. See *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1, 11 (C. A. 7). The district court appears to have been of the opinion that the defendants in good faith believed that their conduct was within rights given by the patent law and to have concluded that in the circumstances the court, insofar as it was free to exercise discretion, should enter a decree as painless to the defendants as possible. The validity of this novel theory is a question of substance which the appeal presents."

While it is quite true, as the Government states, that the District Court was of the opinion that

> "the defendants in good faith believed that their conduct was within the rights given by the patent law,"

it is not true that the District Court's action, in assessing only 50% of the costs against the defendants, constituted any abuse of its inherent discretion, or presents any

> "novel theory"

or

> "question of substance".

As we have already demonstrated, the trial courts are generally invested with

> "large discretion to model their judgments to fit the exigencies of the particular case,"

and this is particularly true with respect to costs, especially in equity proceedings, such as this.

In affirming the decree entered by the trial court, this Court, in *Kansas City Southern Ry. Co.* v. *Guardian Trust Co.*, 281 U. S. 1, 9, 50 S. Ct. 195 (1930), pointed out that (even before the new Rules):

> "In actions at law costs follow the result as of course, but in equity costs not otherwise governed by statute are given or withheld in the sound discretion of the court according to the facts and circumstances of the case."

Rule 54(d) of the present Rules of Civil Procedure, in pertinent part, provides as follows:

> "(d) *Costs.* Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the

prevailing party *unless the court otherwise directs;* * * *" (Emphasis added).

In *Camp* v. *Camelacos*, 131 F. 2d 236 (1942), in affirming the judgment below, the Court of Appeals (Dis. of Col.), at page 237, said:

> "Appellant contends that she should not be required to pay the compensation of a receiver who was appointed on her motion. It was for the court to allocate those costs in accordance with justice, unburdened with any fixed rule. It does not appear to have acted unjustly."

In *United States, for use, etc.* v. *Madsen Construction Co.*, 139 F. 2d 613 (1943), in affirming an assessment of 90% of the costs against an intervenor and 10% against the defendant where the intervenor had recovered only a portion of the amount claimed, the Court of Appeals (6th), at page 616, said:

> "It fell within the discretion of the District Court to apportion the costs. Rules of Civil Procedure, 54 (d). * * *"

In *LeSueur* v. *Manufacturer's Finance Co.*, 285 F. 470 (1922), cer. den. 281 U. S. 621, the Court of Appeals (6th), at page 501, said:

> "We also think the full costs of the proceedings in the District Court should not be awarded to plaintiff, but that those costs should be divided, one-half to plaintiff, the other half to defendants. * * *."

In *Prudence Bonds Corp.* v. *Prudence Realization Corp.*, 174 F. 2d 288 (1947), in affirming an order as to costs, the Court of Appeals (2nd), said:

> "* * *. But the sole issue is one of apportionment of costs, which is a matter left to the sound discretion of the district judge. We see no abuse of discretion justifying our interference."

We see nothing in the *Chicago Sugar Co.* case, cited by the Government, which is contrary to the well-settled rule that the assessment of costs, particularly in equity cases, is a matter for the sound discretion of the trial court, and does not present a

"matter of substance."

In view of these considerations, we submit that the fact that the present decree does not impose the full taxable costs of the proceedings against the defendants, does not demonstrate that the District Court, in modeling its decree to fit the exigencies of this particular case, abused its inherent discretion, or that the decree is in that respect defective or inadequate.

Conclusion and Motions

We therefore submit that the Government's appeal in this case presents no question of substance and that this Court would be entitled to and should dispose of the case at this stage of the proceedings without further briefs or argument.

We therefore move that the Government's said appeal be dismissed or, in the alternative, that the decree in the above entitled cause be affirmed.

Respectfully submitted,

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